

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of ) MM Docket No. \_\_\_\_\_  
 )  
Amendment of Section 73.606(b) ) RM-\_\_\_\_\_  
Table of Allotments )  
Television Broadcast Stations )  
(Bend, Oregon) )

TO: The Commission

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APPLICATION FOR REVIEW

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Pursuant to Section 1.115 of the Commission's Rules, 3-J  
Broadcasting Company ("3-J") hereby seeks review by the full  
Commission of the Memorandum Opinion and Order ("MO&O"), DA 95-  
1644, released August 4, 1995, by the Chief, Policy and Rules  
Division ("Division"), in the above-captioned proceeding.

Question Presented for Review

Did not the Division err in denying the proposed  
allotment of Channel 38 to Bend, Oregon, where (a) that  
allotment satisfies the standards for such an allotment  
and where precedent demonstrates that factors relating  
to the Advanced Television "freeze" shall be considered  
not in the channel allotment stage, but rather at the  
application stage, and further, (b) the proposal would  
in any event satisfy the standards applicable even at  
the application stage?

As set forth in detail below, review by the Commission is  
warranted in this case because the Division's action is in  
conflict with precedent and it involves a question of law and  
policy which has not previously been resolved by the full  
Commission.

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ARGUMENT

1. This proceeding involves what would normally be a routine proposal to allot television Channel 38 to Bend, Oregon. However, Bend is within 175 miles of Portland, Oregon, and Portland is one of the communities which is subject to the freeze in connection with the on-going rule making concerning advanced television technologies. See Public Notice, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 52 FR 28346, July 29, 1987 ("Freeze Order"). Thus, the freeze technically applies to this proposal.

2. However, the Division has not applied the freeze to allotment proceedings, but instead has gone forward with at least one channel allotment involving less than the minimum mileage separations prescribed by the freeze. In that instance the Division did not even impose a site restriction on the allotment. Instead, the Division allotted Channel 36 to Roseburg, Oregon, which is within 175 miles of Portland. In so doing, the Division simply noted that

any application which is filed for [the] channel which does not specify at least a 175 mile separation to Portland, Oregon, may not be accepted for filing.

Roseburg and Canyonville, Oregon, 3 FCC Rcd 4311 (1988). In other words, the Division appears to have concluded that a mere allotment within the freeze zone is not inappropriate, and does not even require any formal "waiver" or any site restriction, since the freeze zone can ultimately be protected most effectively at the application stage.

3. The Roseburg allotment proceeding is particularly relevant to this case because, when the proponent there filed its application for use of Channel 36 in Roseburg, the site specified in the application was itself within the freeze zone. That is, contrary to the apparently prohibitive language in the Roseburg Report and Order quoted above, the Commission was willing to waive the freeze zone spacing requirement. See KMTR, Inc., Ref. 8940-MLB (March 5, 1990). The basis for that waiver was, in the Commission's words, the fact that the Commission "[did] not believe that operation of Channel 36 in Roseburg will preclude use of that channel for ATV service in the Portland area." Id.

4. The KMTR/Roseburg situation, then, demonstrates clearly that television allotments can be made within the freeze zone, and applications for those allotments can be granted as long as the Commission is satisfied that operation on such allotments will not preclude use of the channels in the communities protected by the freeze.

5. In its petition for rule making, 3-J noted that its proposed allotment of Channel 38 to Bend was within the freeze zone. However, 3-J cited the KMTR/Roseburg situation for the proposition that the allotment could be made irrespective of that fact. 3-J also pointed out that, even if the second-level "application" analysis of the KMTR/Roseburg situation were to be invoked with respect to 3-J's first-level allotment proposal, that proposal would still satisfy the "no preclusion" standard established by the Commission's grant of the KMTR application. A

detailed engineering showing in support of this position was included in the petition.

6. 3-J's petition for rule making was rejected by the Chief, Allocations Branch, by letter dated July 18, 1994. A copy of that letter is included as Attachment A hereto. According to that letter, 3-J's petition was rejected because that petition  
is not an existing licensee seeking a change in its facilities nor does it concern noncommercial educational television broadcasting.

See Attachment A.

7. 3-J sought reconsideration of that decision, pointing out that the standard applied to it (and quoted in the preceding paragraph) was not the correct standard, since it was flatly contradicted by the KMTR/Roseburg precedent. In particular, 3-J explained that the applicant in the KMTR case was not "an existing licensee seeking a change in its facilities". Rather, the applicant there was simply an applicant for a new television station in Roseburg. <sup>1/</sup> Thus, the basis for rejecting 3-J's proposed allotment was plainly incorrect in light of the KMTR/Roseburg precedent.

8. 3-J also argued on reconsideration that, contrary to the incorrect standard initially applied to its proposal, the

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<sup>1/</sup> The applicant in question did happen to be a licensee of another station in the area. However, the proposed Channel 36 allotment to Roseburg was not intended to be a substitute for that licensee's existing operation. Rather, the Channel 36 allotment was to be used (and, to the best of 3-J's knowledge, is presently being used) as a completely different facility, separate and apart from KMTR's other, previously-existing station.

proper standard required, at most, an analysis of whether 3-J's proposal would preclude use of Channel 38 in Portland. As noted above, 3-J's original petition for rule making had included a demonstration that no preclusion would occur for a variety of reasons. However, in view of the erroneous standard utilized by the staff to reject 3-J's petition, 3-J's showing was never accorded any substantive consideration.

9. In the Division's MO&O rejecting 3-J's petition for reconsideration, the Division misstates the law, ignores the facts, and simply rubber-stamps its earlier rejection of 3-J's proposal.

10. First, the Division states that

[3-J] has provided no instance where the Commission granted a waiver of the Freeze Order at the allotment stage. Rather, the KMTR waiver involved an application for an existing channel.

MO&O at ¶4. This assertion is disingenuous, at best, as it ignores the channel allotment proceeding which resulted in the availability of the channel for which the KMTR waiver was granted at the application stage. That channel was allotted to Roseburg irrespective of the fact that the allotment was within the freeze zone. While, in so allotting that channel, the Commission did not use the term "waiver", there can be no question that the effect of that allotment was a waiver (whatever terminology the Division may try to use to mask that fact) of the freeze zone.

11. The Division seems to recognize this problem, as it then proceeds in the MO&O to attempt to distinguish the KMTR/Roseburg allotment. According to the MO&O, that allotment

was granted

based upon a finding that the transmitter could be sited at least 11 miles south of Roseburg so as not to be affected by the [ATV freeze] and the petitioner's willingness to specify such a site.

MO&O at ¶4. Perhaps so, but there is no indication that that "finding" was a sine qua non of the allotment. Normally, where it appears at the allotment stage that some restriction on possible transmitter sites may be necessary in order to assure compliance with, e.g., minimum mileage separations, the Commission will simply impose a specific site restriction on the allotment. Such site restrictions are absolutely commonplace, and the Commission is quite explicit when it imposes such restrictions.

12. But no such site restriction was included in connection with the Roseburg allotment and, indeed, the Report and Order in that proceeding appeared to contemplate that applications specifying sites within the freeze area might in fact be filed and might even be accepted. See Roseburg/Canyonville, Oregon, 3 FCC Rcd 4311, ¶4.<sup>2/</sup> Since no site restriction was imposed in the Roseburg allotment, it is odd -- and erroneous -- for the MO&O in the instant proceeding even to suggest that as a basis

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<sup>2/</sup> The Roseburg/Canyonville, Oregon decision stated that any application which is filed for this channel which does not specify at least a 175 mile separation to Portland, Oregon, may not be accepted for filing if the Commission's freeze on such applications is still in effect.

3 FCC Rcd 4311, ¶4.

for distinguishing the Roseburg case from the instant case. <sup>3/</sup>

13. The MO&O then asserts that 3-J has "misconstrued" the basis for the grant of the Roseburg waiver at the application stage. Now, to be perfectly clear on this point, 3-J does not believe that consideration of the standards for waiver at the application stage are necessarily relevant to the instant case, as 3-J has yet to file an application. But even if the Commission now concludes (contrary to its own KMTR/Roseburg precedent) that those standards can and should be considered at the allotment stage, 3-J believes it has satisfied those standards.

14. Unfortunately, the terse, back-of-the-hand, completely non-analytical treatment in the MO&O relative to 3-J's showing falls far short of the level of analysis appropriate for disposition of such matters. All the MO&O says is that

The transmitter site specified by KMTR is 161.1 miles from Portland and thus a waiver at the application stage of 13.4 miles was involved. Bend, on the other hand, is located only 121.2 miles from Portland, thus

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<sup>3/</sup> It is doubly ironic that the Division would attempt to hang its hat on the notion that the Roseburg situation involved some crucial "site restriction". As discussed in the text, no such restriction was, in fact, imposed on the Roseburg channel at the allotment stage, even though the staff had plainly focused on the question of some possible restriction. It is thus puzzling how the Commission could claim to rely on such a restriction to distinguish that case from this. But what is really ironic is that, when KMTR finally filed for use of the channel, it proposed a site within the freeze zone, notwithstanding the language in the allotment report and order suggesting that no such site might be granted. In other words, for all its big talk about protecting the freeze area, in the Roseburg case the Commission chose not once, but twice, to ignore that talk -- it not only allotted a channel within that area, but it then authorized service on that channel also within that area.

requiring a waiver of at least 53.3 miles.

MO&O at ¶5. But 3-J's showing was premised not on the mileage separation factor which is the sole focus of the MO&O. Rather, 3-J relied on a detailed showing relating to the effects of the rugged terrain profile between Bend and Portland. See 3-J Petition for Rule Making. Those effects appear to eliminate any possible preclusive effect of the proposed Bend allotment vis-à-vis Portland. The MO&O does not even refer to 3-J's showing, nor does it purport to explain why, notwithstanding the rugged intervening terrain, the proposed Bend allotment could conceivably be deemed to preclude use of Channel 38 in Portland as well.

15. If, as the MO&O suggests, the Commission believes now (notwithstanding the clearly contrary Roseburg precedent) that a showing of no preclusion is required at the allotment stage (as opposed to the later application stage), then 3-J is, at a minimum, entitled to full consideration of its showing in light of the standard articulated in KMTR, supra. That standard requires a determination of whether operation of Channel 38 in Bend "will preclude use of that channel for ATV service in the Portland area." 3-J has provided the Commission with a detailed engineering showing supporting 3-J's position that no such preclusion will occur. Thus far the Division has completely failed to address that showing at all, much less in any detailed, meaningful manner.



WHEREFORE, for the reasons stated, the decision of the Division, below, to reject 3-J's proposed allotment of Channel 38 to Bend is inconsistent with precedent, arbitrary and capricious. That decision should be reversed, and Channel 38 should be allotted to Bend for the reasons previously advanced by 3-J.

Respectfully submitted,

*Ann C. Farhat*

/s/ Ann C. Farhat  
Ann C. Farhat

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Counsel for 3-J Broadcasting Company

September 1, 1995

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

IN REPLY REFER TO:

JUL 18 1994

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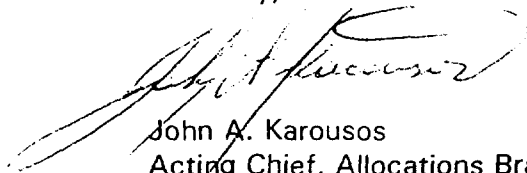
Dear Ms. Farhat:

This is in response to the petition for rule making which you submitted on behalf of 3-J Broadcasting Company requesting the allotment of UHF TV Channel 38 to Bend, Oregon, as the community's fourth local and second commercial television channel.

You state that Bend is located 194.1 kilometers from the Portland, Oregon, reference coordinates and thus your request is subject to the Freeze Order issued in connection with the Commission's rule making concerning advanced television technologies. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, 52 FR 28346, July 29, 1987. You contend that a waiver of the freeze should be granted in this case because Channel 38 at Bend would have no preclusive effect on the possible Portland allotments since the channel is already precluded by the existence of Portland Channels 24, 30 and 40.

The Commission's Freeze Order does permit waiver requests to be considered on a case-by-case basis. However, these requests are limited to noncommercial channels and to licensees which provide "compelling" reasons why the freeze should not apply to their particular situation or class of station. In this case, 3-J Broadcasting Company's request falls within neither exception since it is not an existing licensee seeking a change in its facilities nor does it concern noncommercial educational television broadcasting. Therefore, the request of 3-J Broadcasting Company to allot Channel 38 to Bend, Oregon, is not acceptable for consideration at this time.

Sincerely,



John A. Karousos  
Acting Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

CERTIFICATE OF SERVICE

I, Ann C. Farhat, hereby certify that, on this 1st day of September, 1995, I caused copies of the foregoing "Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid (or, as indicated below, hand delivered) to the following persons at the addresses indicated:

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